

PALM TREE JUSTICE AND THE ABA STANDARDS

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Attorney ethics systems have long struggled with the problem of avoiding “palm tree justice” — making decisions solely on the particular circumstances of each case. On one hand, “each case must be decided on its own facts.” *In re Hedlund*, 293 N.W.2d 63 (Minn. 1980). On the other hand, the Court desires to be “both fair and consistent” in choosing the appropriate discipline. *In re Serstock*, 316 N.W.2d 559 (Minn. 1982).

The enormous growth in the last 15 years in the numbers of lawyers, complaints, and disciplinary cases nationwide has increased the difficulty of taking account of individual circumstances while imposing congruent disciplines for similar offenses. Consistency is needed for justice to be done and be perceived as done, and also to give advance notice of the expected consequences of different types of disciplinary rule violations.

In February 1986 the American Bar Association adopted as its policy the Standards for Imposing Lawyer Sanctions. The Standards for Sanctions is the product of years of effort by the ABA Joint Committee on Professional Sanctions. The committee reviewed several thousand lawyer discipline cases from a nationwide sample. The committee then attempted to identify discipline patterns and establish general standards for discipline. In surveying various cases, the committee found wide variations among jurisdictions and even within single jurisdictions:

As an example of this problem of inconsistent sanctions, consider the range and level of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year, while in 1980, a lawyer who failed to file income tax returns for two years was merely censured.

The committee did not merely report statistical findings, but established a theoretical framework for considering discipline sanctions. The framework involved answering the following questions:

1. What ethical duty did the lawyer violate? (A duty to the client, the public, the legal assistant, or the profession?)
2. What was the lawyer’s mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
3. What was the extent of the actual or potential injury caused by the lawyer’s misconduct? (Was there a serious or potentially serious injury?) and
4. Are there any aggravating or mitigating circumstances?

The standards state the discipline presumptively appropriate for common violations of basic duties. For example, Standard 4.11 is,

Absent aggravating or mitigating circumstances, . . . Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

A commentary follows each such standard, stating the rationale and citing particular authorities. The standards attempt to promote consistency rather than absolute uniformity.

Several states have already considered the applicability of the standards for sanctions. The Oregon Supreme Court stated:

Our intention has recently been directed to standards adopted by the American Bar Association for imposing lawyer sanctions. These standards are designed to provide an analytical framework for courts to decide what should be an appropriate sanction for violation of the disciplinary rules. We are disposed to use those standards, insofar as we find them to be applicable and persuasive. *In re Conduct of Luebke*, 722 P.2d 1221 (Or. 1986).

The Court then devoted two pages of its opinion to applying the standards to the particular facts of *Luebke*. In Florida, the Board of Governors will consider at its November meeting a proposal for adoption of the standards in Florida. Whether the standards are considered as authority in individual cases, or are proposed for formal adoption by a board of the Court, will vary in each state. In Minnesota, the director's office has cited the standards in several pending matters before the Court and in cases before Lawyers' Board panels.

Minnesota has previously followed the lead of the ABA in some professional responsibility matters. The Court adopted in substantially the model ABA form the Code of Professional Responsibility in 1970 and the Rules of Professional Conduct in 1985. The procedural Minnesota Rules on Lawyers Professional Responsibility are in many ways modeled after the ABA's Standards for Lawyer Discipline and Disability Proceedings. However, Minnesota also adopted several unique procedures. The ABA's *Clark Report* (1970) was the foundation for modern professional responsibility systems in almost all states.

Consistency, not rigid *uniformity*, should be the goal in professional responsibility. Whether the new ABA standards for sanctions are adopted in something like the fashion of the criminal sentencing guidelines, or are considered for application on a case-by-case basis, will have to be decided in each state.

There are now about 16,000 licensed Minnesota attorneys, 1,200 disciplinary complaints a year, and approximately 30 Minnesota Supreme Court disciplinary decisions annually. The Court has tried to establish consistency by stating presumptive disciplines and proof requirements in certain types of cases, including: nonfiling of tax returns, *In re Bunker* 199 N.W.2d 628 (Minn. 1972); extensive misappropriation, *In re Austin* 333 N.W.2d 633 (Minn. 1980); felonies, *In re Hedlund* 293 N.W.2d 63 (Minn. 1980); alcoholism as mitigation, *In re Johnson* 322 N.W.2d 616 (Minn. 1982); mental illness as mitigation, *In re Weyhrich* 339 N.W.2d 274 (Minn. 1983).

Attention has to be paid to the individual facts of each case, but the Court has also stated its desire to apply a fair and consistent framework for all cases. The ABA Standards for Imposing Lawyer Sanctions and the Minnesota Supreme Court's precedents are a foundation for building such a framework, and thereby

avoiding palm tree justice.